Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

AIRTRAN AIRWAYS, INC.,

Petitioner,

v.

MICHAEL F. BRANCHE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Florida Whistleblower Act, Fla. Stat. § 448.102, is pre-empted by the Airline Deregulation Act, 49 U.S.C. § 41713, as amended by the Whistleblower Protection Program, 49 U.S.C. § 42121.

2. Whether the panel's decision by the Eleventh Circuit conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

CORPORATE DISCLOSURE STATEMENT

Petitioner, AirTran Airways, Inc., is a wholly owned subsidiary of AirTran Holdings, Inc.

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OPINIONS BELOW

The Order by the United States Court of Appeals for the Eleventh Circuit granting appeal by Plaintiff and ordering the case to be vacated and remanded to the United States District Court for the Middle District of Florida was issued on August 21, 2003, and is reproduced in the Appendix at A.

The Order by United States District Court for the Middle District of Florida granting Defendant's Motion for Summary Judgment was issued on August 27, 2002, and is reproduced in the Appendix at B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 21, 2003 and the Petition for Rehearing En Banc was denied on October 2, 2003 (Appendix C). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

49 U.S.C. § 42121 — Attached in Appendix D.

49 U.S.C. § 41713 — Attached in Appendix D.

Fla. Stat. § 448.102 — Attached in Appendix D.

STATEMENT OF THE CASE

Respondent Michael Branche filed a single-count complaint in state court which alleged a retaliatory discharge of his employment under the Florida Whistleblower Act. Mr. Branche alleged that he was employed by AirTran Airways, Inc. ("AirTran") as an aircraft inspector at Tampa International Airport, with responsibility to conduct safety inspections of AirTran's aircraft after they had been serviced by AirTran's maintenance crew but prior to takeoff. Petitioner AirTran removed the case to federal district court on the basis of diversity.

Mr. Branche alleged in the Complaint that on June 30, 2001, an AirTran DC-9 airplane landed in Tampa with one of its two engines running at a temperature that exceeded Federal Aviation Administration (FAA) safety guidelines, a condition that could result in engine failure, and that Mr. Branche recommended to AirTran's Tampa maintenance manager that the engine be inspected. He further alleges that the manager and two maintenance workers climbed into the aircraft's cockpit and conducted a "high powered run" to ascertain the plane's airworthiness, but that none of the three were qualified to undertake this diagnostic maneuver and in doing so violated FAA regulations. Mr. Branche also avers that the AirTran employee qualified to perform these tests was present at the Tampa airport.

Respondent Branche goes on to allege that the engine overheated in flight after departing to Atlanta, that the plane was subsequently taken out of service, and that he investigated that particular engine the next day and learned that it had overheated on two separate occasions during the preceding two weeks. Two days later Mr. Branche informed

the FAA of AirTran's regulatory violations, and four days after that he filed a union grievance asserting that the maintenance manager and the two mechanics had performed an unauthorized high powered engine run. Respondent Branche alleges that later in the month he was fired for a time card violation and theft of two hours of pay, but that the true reason for his discharge was retaliation for reporting AirTran violations to the FAA.

Following discovery, AirTran moved for summary judgment on the ground that Mr. Branche's claim under the Florida Whistleblower Act was pre-empted by the Airline Deregulation Act, 49 U.S.C. § 41713 (the "Deregulation Act"), amended by the 1999 Whistleblower Protection Program, 49 U.S.C. § 42121 (the "Whistleblower Program"). The district court granted summary judgment, and subsequently entered judgment for AirTran. Mr. Branche appealed to the Eleventh Circuit Court of Appeals. The court posed the question for consideration as whether Mr. Branche's claim significantly affects air carrier "services" as that term is used in the pre-emption provision of the Deregulation Act. The court held that this is "a close question" made "especially difficult" by the fact that the Whistleblower Program contains a remedy which parallels the one available under the Florida Whistleblower Act "for plaintiffs in Branche's position." 342 F.3d at 1250-51.

The court's decision acknowledges that the Whistleblower Program was held to pre-empt a state whistleblower cause of action in *Botz v. Omni Air Int'l, Inc.*, 286 F. 3d 488 (8th Cir. 2002). Nonetheless, the court construed the Whistleblower Program in the manner that *Botz* rejected, to reach an opposite conclusion with respect to the pre-emption of Mr. Branche's state law whistleblower claim.

Accordingly, the court vacated the judgment for AirTran and remanded for further proceedings. AirTran filed a petition for rehearing *en banc* which was denied, following which AirTran timely filed this certiorari petition.

REASONS FOR GRANTING THE PETITION

A. The decision of the Eleventh Circuit Court of Appeals presents decisional conflict with the Eighth Circuit Court of Appeals.

This case addresses the pre-emptive effect on state whistleblower statutes of the 3-year old Whistleblower Program amendment to the Deregulation Act. The Eleventh Circuit decision brought for review applies that pre-emptive effect in a manner which directly conflicts with an application of the same federal statute by the Eighth Circuit, and with a growing number of courts which have been called upon to consider precisely the same issue. To date, the Court has never addressed this issue.

The Eleventh Circuit's decision provides a textbook example of the type of case which the Court has said will prompt its consideration for review — a circuit court decision "in conflict" with another circuit court decision on "the same important matter." Sup. Ct. R. 10(a).

B. Conflicting circuit court decisions on the pre-emptive effect of the Deregulation Act as amended by the Whistleblower Program on state whistleblower statutes present a compelling reason for the Court's review.

The principles for determining the pre-emptive effect of a federal statute on a state statute are well-established by the

decisions of the Court. The courts start with an assumption that state police powers are not superseded unless Congress has made clear a desire for pre-emption.[1] The pre-emption analysis is then guided by a determination of congressional intent, either express or implied,[2] beginning with the plain language of the statute.[3] The particular language to be construed in this case was the federal prohibition against state laws having the force and effect of a federal statute "related to . . . service of an air carrier,"[4] and the language of the protections and remedies written into the Whistleblower Program.[5]

The term "related to" in this statute has already been held by the Court to have a "broad scope" and an "expansive sweep,"[6] in further of the Whistleblower Act's "overreaching deregulatory purpose."[7] Before the enactment of the Whistleblower Program in 1999, the term "service" had also

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1. *E.g., Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001).

2. *E.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

3. *E.g., Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985).

4. 49 U.S.C. § 41713(b)(1) (1994).

5. 49 U.S.C. § 42121.

6. *Morales v. Trans WorldAirlines, Inc.*, 504 U.S. 374, 385 (1992)).

7. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 229, n.5 (1995).

been given a broad scope in furtherance of that congressional purpose in *en banc* decisions of the Fifth and the Ninth Circuits.[8]

In the decision now brought for review, the Eleventh Circuit has acknowledged that enactment of Whistleblower Program was designed by Congress to provide protection and federal remedies for the *specific* kind of action taken by Mr. Branche in this case.[9] The Eleventh Circuit has also acknowledged, and in fact found "more compelling," the broad definition of the term "service" articulated by the Fifth Circuit in *Hodges*.[10] Yet the court drew conclusions from the applicable legal principles which are diametrically opposed to the principles drawn by the Eighth Circuit from the same statutory language, congressional intent, and common law interpretations. The result is a decision which seriously devalues congressional intent with respect to the Whistleblower Program that Congress engrafted onto the Deregulation Act, and poses a circuit conflict which only the Court can resolve.

1. The Principles of Pre-emption

It is well settled that Congress may demonstrate its intent to pre-empt state law either implicitly or explicitly.[11] It is

8. *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995 (*en banc*)); *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265-66 (9th Cir. 1998 (*en banc*)).

9. *Branche v. AirTran Airways, Inc.*, 342 F.3d at 1251.

10. 342 F.3d at 1257.

11. *Cipollone*, 505 U.S. at 516.

also well settled that neither the inclusion of an express pre-emption clause nor a saving clause bars the ordinary working of conflict pre-emption principles.[12]

Congress has *explicitly* addressed the issue of pre-emption through an express pre-emption clause set forth in the Deregulation Act, and through the 1999 amendment to the Act which created the Whistleblower Protection Program. That Program offers a remedy for air carrier employees, such as Mr. Branche, that parallels the Florida Whistleblower Act. The Deregulation Act's express pre-emptive effect is given context and purpose by the Whistleblower Program, which illustrates the types of claims Congress intended the Deregulation Act to pre-empt.[13] The congressional goal of ensuring that the price, availability and efficiency of air transportation should rely primarily on market forces and competition is substantially furthered by the Whistleblower Program's creation of a uniform standard for dealing with employee complaints of air-safety violations.[14] The Eleventh Circuit's decision, in contrast to that of the Eighth Circuit, destroys the uniformity for which the Whistleblower Program

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12. *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) (pre-emption may be found where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.)

13. *See Botz*, 286 F.3d at 495-56.

14. *See* 49 U.S.C. §§ 40101(a)(6) and (a)(7) (1994) (declaring Deregulation Act's policy of fostering a sound regulatory system that responds to the public's needs and reaches decisions promptly); *Morales*, 504 U.S. at 378 (explaining that Congress added the pre-emption provision to the Deregulation Act "[t]o ensure that the States would not undo federal deregulation with regulation of their own").

was expressly enacted, by casting federal pre-emption decision-making into the abyss of piecemeal, case-by-case analysis.

2. The Eighth Circuit

In *Batz*, the Eighth Circuit specifically addressed the scope of pre-emption under the Deregulation Act in the context of a claim under a state whistleblower claim which alleged a retaliatory discharge for an employee's report of safety violations to the FAA — the exact same context presented to the Eleventh Circuit in this case. The Eighth Circuit held that the Deregulation Act pre-empts claims arising under state whistleblower statutes which are "related to" prices, routes, or "services" of an air carrier.[15]

The court reached that conclusion after considering the purpose of Congress as expressed in the plain language of Act, as directed by *Cipollone*. 505 U.S. at 516 (1992). The court also examined the statutory intent of the Act as expressed in *Morales*, 504 U.S. at 390 (1992), and the Court's determination that the courts must give a broad meaning to the phrase "related to" and to the pre-emptive purpose of the Act with respect to all state enforcement actions which have a "connection with or reference to airline rates, routes, or services." 504 U.S. at 375. Following the Court's reasoning in those cases, the Eighth Circuit concluded that FAA violations will result in the grounding of an airplane, and that any grounding is related both to airline services and to the transport of passengers from one place to another.

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15. *See Botz*, 286 F.3d at 491.

The analysis and reasoning of the Eighth Circuit is also reflected in decisions of a federal district court in Hawaii and a Minnesota appellate court, both of which found federal pre-emption of state whistleblower statutes based on an interpretation of the term "services." In *Marlow v. AMR Services Corp.*, 870 F. Supp. 295 (D. Haw. 1994), the court held that the Hawaii Whistleblower's Protection Act was pre-empted by the Deregulation Act on the grounds that jetbridges were an integral part of air carrier services regardless of who maintains them, and that jetbridge maintenance is included within the meaning of carrier "services." In *Regner v. Northwest Airlines, Inc.*, 652 N.W.2d 557 (Minn. Ct. App. 2002) the court held that a state whistleblower act claim was pre-empted by the Deregulation Act because an aircraft mechanic can interrupt services by grounding an aircraft for mechanical failures.

3. The Eleventh Circuit

In *Branche*, the Eleventh Circuit also engaged in a construction of the pre-emption provision of the Deregulation Act, the Whistleblower Program and case law from other courts, including *Hodges* and *Charas*. Using the same materials as the court in *Botz*, the court denied federal pre-emption of Branche's claim of a retaliatory discharge for reporting violations of safety regulations to the FAA. The court concluded that Branche's claim does not implicate any arena in which airlines compete, and does not relate to any "service" of an air carrier within the meaning of § 41713.[16]

The court viewed the pre-emption clause of the Deregulation Act as promoting maximum reliance on

16. *Branche*, 342 F. 3d at 1259-61.

competing market forces, to shape the airline industry, as opposed to state regulation. On that basis, the court held that since the Florida Whistleblower Act does not explicitly address airline services, the only possible basis for pre-emption would be if the Act has a significant impact on airline services which are tied to market forces. Failing to find any impact in the Florida statute, the court held that the Deregulation Act did not universally pre-empt claims brought under the Florida law.

The gravamen of the court's decision is the notion that the phrase "related to the . . . services" of an air carrier in the Deregulation Act's pre-emption clause encompasses only those actions with a connection or reference to the elements of air travel that are bargained for between passengers and air carriers.[17] The court acknowledged that this includes both the physical transportation of passengers and the incidents of that transportation over which the airlines compete,[18] but reasoned that Mr. Branche's retaliatory discharge claim did not relate in any notable way to the transportation of passengers or affect airline "services" as defined in decisions of the Third and Ninth Circuits.[19]

The court further found that Mr. Branche's retaliatory discharge claim did not significantly affect any bargained-for element of air carrier operations, as defined by the Fifth

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17. *Id.* at 1258.

18. *Id.* at 1259.

19. *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d Circ. 1998); *Charas v. Trans World Airlines, Inc.*, 169 F.3d 594 (9th Cir. 1999) ("service" defined as things such as frequency and scheduling of transportation and the selections of markets).

and the Seventh Circuits.[20] This analysis by the court resulted in a decision which directly conflicts with the Eighth Circuit on the same essential facts — namely, a claim of retaliatory discharge for reporting violations of federal regulations to the FAA, with the possible resulting consequence that aircraft would be grounded or delayed in departure.

As noted earlier, the Eighth Circuit's decision is not the only one with a like conclusion regarding the effect of safety violations on air carrier "services." *Regner* involved a plaintiff responsible for airline mechanics who alleged his termination for reporting safety violations to the FAA (like Mr. Branche in this case). The *Regner* court found that an aircraft mechanic can interrupt services by grounding an aircraft for alleged mechanical violations, in recognition that Congress' amendment of the Deregulation Act to include the Whistleblower Program was an attempt by Congress to address the issue of pre-emption for whistleblower claims brought by aggrieved employees.[21]

In *Marlow*, the court also held, largely in reliance on the Fifth Circuit's *Hodges* decision, that the state whistleblower law was pre-empted because jetbridge maintenance is integral to airline services. The court logically reasoned that jetbridge maintenance affects boarding procedures, which in turn have a direct affect on airline services.[22] It is significant that the

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20. *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir.) (elements of air carrier service include such items as ticketing, boarding procedures, provision of food and drink, and baggage handling in addition to transportation itself); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996).

21. 652 N.W.2d at 562.

22. 870 F. Supp. at 298.

Eleventh Circuit also relied on the *Hodges* decision, but reached exactly the opposite conclusion on whether the reporting of violations of required FAA safety requirements can result in the grounding of an airplane and, thereby, affect transportation "services."

The Eleventh Circuit failed to recognize that Mr. Branche's identification of unauthorized service personnel performing a safety inspection prior to the plane's departure to Atlanta, and his reporting alleged safety violations to the FAA, were precisely the type of "service" issues which will cause aircrafts to be grounded. A grounded aircraft would be taken out of service for a proper inspection, for maintenance, and for repair, with the effect of making the aircraft unavailable and cause the cancellation of scheduled passenger transportation. Thus, there is a direct correlation between the detection and reporting of safety violations and the scheduling and routes flown by an aircraft — precisely the form of "services" which airlines provide to their customers.

Significantly, the court's decision completely ignores the fact that airlines compete on the basis of reliability and on-time performance. Airline customers are keenly aware of the experience and records of airlines in these regards. Maintenance issues, obviously, directly impact schedules and reliability — factors of particular interest to passengers. Yet the Eleventh Circuit's turgid analysis disregards what the Eighth Circuit found compelling — to wit, the economic impact of grounding an aircraft, and its resulting effect on service and the physical transportation of passengers.

In sum, the Eleventh Circuit's decision has completely overlooked the fact that employment actions, and specifically the alleged firing of employees for calling attention to

improper inspections and reporting safety violations to the FAA, necessarily and inescapably affects the transport of passengers and their marketing choices, as incidents of air carrier "services."[23]

One of the most significant deficiencies in the Eleventh Circuit's decision for purposes of this Court's jurisdiction is its failure to give adequate consideration to the scope of the Whistleblower Program as it relates to pre-emption. The court reasoned that any inference from the enactment of the federal remedies provided in that Program would be a species of "implied" pre-emption, which the court *presumed* to be inapplicable because of the express pre-emption clause in the Deregulation Act.[24] This Court has repeatedly held that the inclusion of an express pre-emption clause does *not* foreclose considerations of implied pre-emption.[25] Unlike the Eleventh Circuit, the Eighth Circuit duly noted that the pre-emptive effect of the Deregulation Act was in fact bolstered by Congress' enactment of the Whistleblower Program.[26]

The Eleventh Circuit's analysis with respect to the Whistleblower Program counters congressional intent that there be uniformity in remedies for whistleblowers. By requiring an *ad hoc*, case-by-case analysis of the issue based on the particular timing and nature of the safety acts of airline

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23. *See, e.g, Marlow*, 870 F. Supp. at 299.

24. 342 F.3d at 1263-64.

25. *Geier*, 529 U.S. at 869; *Freightliner Corp.*, 514 U.S. at 287.

26. *Botz*, 286 F.3d at 497.

employees, the court has obliterated any hope of uniformity in the application of the Whistleblower Program.

CONCLUSION

There are diametrically opposed decisions from the Eighth and Eleventh Circuits regarding the important issue of pre-emption of state whistleblower statutes by the Deregulation Act now amended by the Whistleblower Program. The effect of the Eleventh Circuit's decision is to create conflict on an issue of increasing importance throughout the nation.

Based on the foregoing, AirTran respectfully requests that the Court grant certiorari to resolve this split of authority, and to restore uniformity to the remedial measures Congress has provided for airline safety.

Respectfully yours,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 21, 2003

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 02-14920

D.C. Docket No. 01-01747-CV-8-T-30M

MICHAEL F. BRANCHE,

Plaintiff-Appellant,

v.

AIRTRAN AIRWAYS, INC., a foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(August 21, 2003)

Before MARCUS and WILSON, Circuit Judges, and RESTANI*, Judge.

MARCUS, Circuit Judge:

This case ultimately requires us to determine whether a claim brought by appellant Michael Branche ("Branche") against his former employer, Airtran Airways, Inc. ("Airtran"), pursuant to Florida's Whistleblower Act, Fla. Stat. § 448.102, is expressly pre-empted by the federal

* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713. This question forces us, in turn, to decide whether Branche's claim significantly affects "air carrier services," as that phrase is used in the ADA's pre-emption clause. This is a close question that is rendered especially difficult by Congress's 1999 amendment of the ADA to include the Whistleblower Protection Program ("WPP"), 49 U.S.C. § 42121, a provision that offers a remedy for plaintiffs in Branche's position that parallels the one available under Florida law. After thoroughly considering the arguments raised by the parties and the applicable caselaw, we conclude that Branche's claim is not pre-empted. Because the district court held contrarily, we vacate its entry of final summary judgment in favor of Airtran and remand this case for further proceedings consistent with this opinion.

I

The basic facts are these. Branche was first hired by Airtran on September 2, 1998 as a maintenance controller, and he subsequently was transferred to the position of aircraft inspector at Tampa International Airport ("TIA"). In fact, Branche was appellee's only aircraft inspector at TIA. In this capacity, appellant was required to conduct safety inspections of Airtran's aircraft after they had been serviced by appellee's maintenance crew but prior to takeoff. These inspections were governed by FAA regulations, including 14 C.F.R. § 121.365(c),[1] which provides that this inspection

1. This subsection provides:

> Each person performing required inspections in addition to other maintenance, preventive maintenance, or

(Cont'd)

function is to be exercised free from the oversight of the maintenance department whose work the inspector reviews. Branche says that during June, 2001, Guy Lewis, Airtran's maintenance manager at TIA, began exercising supervisory authority over him in direct contravention of § 121.365(c).

Branche alleges that on June 30, 2001, an Airtran DC-9 airplane landed at TIA with one of its two engines running at a temperature that exceeded Federal Aviation Administration ("FAA") safety guidelines, a condition that could have resulted in engine failure. After perceiving this dangerous condition, Branche recommended to Lewis that the engine be subjected to a detailed physical inspection. Instead, Lewis and two maintenance workers climbed into the aircraft's cockpit and conducted a "high powered run," i.e., began running the engine at high power in an effort to ascertain its air-worthiness. Appellant alleges that none of these individuals were qualified to undertake this diagnostic maneuver, and that as such they violated 14 C.F.R. § 65.81[2]

(Cont'd)

> alterations, shall organize the performance of those functions so as to separate the required inspection functions from the other maintenance, preventive maintenance, and alteration functions. The separation shall be below the level of administrative control at which overall responsibility for the required inspection functions and other maintenance, preventive maintenance, and alteration functions are exercised.

14 C.F.R. § 121.365(c).

2. This section provides:

> (a) A certificated mechanic may perform or supervise the maintenance, preventive maintenance or alteration

(Cont'd)

in performing it. He further asserts that Paul Picarelli, an employee who was authorized to perform high powered runs, was present at TIA at the time, and that under § 65.81 Picarelli should have been asked to test the engine in question. Branche says that after the plane departed from TIA on June 30, 2001, the engine overheated during its flight to Atlanta and the plane subsequently was taken out of service. Moreover, he alleges that the following day he investigated this particular engine and learned that it had overheated on two separate occasions during the preceding two weeks.

(Cont'd)

> of an aircraft or appliance, or a part thereof, for which he is rated (but excluding major repairs to, and major alterations of, propellers, and any repair to, or alteration of, instruments), and may perform additional duties in accordance with §§ 65.85, 65.87, and 65.95. However, he may not supervise the maintenance, preventive maintenance, or alteration of, or approve and return to service, any aircraft or appliance, or part thereof, for which he is rated unless he has satisfactorily performed the work concerned at an earlier date. If he has not so performed that work at an earlier date, he may show his ability to do it by performing it to the satisfaction of the Administrator or under the direct supervision of a certificated and appropriately rated mechanic, or a certificated repairman, who has had previous experience in the specific operation concerned.
>
> (b) A certificated mechanic may not exercise the privileges of his certificate and rating unless he understands the current instructions of the manufacturer, and the maintenance manuals, for the specific operation concerned.

14 C.F.R. § 65.81.

On July 2, 2001, Branche informed the FAA of Airtran's regulatory violations, and both he and Airtran subsequently were contacted regarding his allegations. Airtran soon became aware that Branche was the source of the FAA's knowledge of the incidents in question. On July 6, 2001, appellant filed a formal union grievance in which he asserted that neither Lewis nor the mechanics who accompanied him in the cockpit were authorized to perform a high power engine run. Then, on July 13, 2001, Airtran accused him of falsifying his time card and stealing approximately two hours of pay. Appellant denied the allegation. On July 23, 2001, Branche was terminated based on this alleged time card violation. Appellant posits that the true reason for his discharge was retaliatory, i.e., to punish him for reporting Airtran's violations of FAA regulations.

Based on this pattern of dealing, on August 27, 2001 Branche filed this action in the Circuit Court for the Sixth Judicial Circuit, in Pinellas County, Florida. He advanced a single claim under Florida's Whistleblower Act, Fla. Stat. § 448.102. Airtran promptly removed the case on the basis of diversity to the United States District Court for the Middle District of Florida, where discovery proceeded. On June 24, 2002, Airtran moved for final summary judgment denying appellant's claim, arguing that as applied in this case the state Whistleblower Act was explicitly pre-empted by the ADA, 49 U.S.C. § 41713. The district court agreed, and granted Airtran's motion on August 27, 2002. This appeal ensued.

On appeal, Branche argues that the district court erred by holding that the ADA pre-empts Florida's Whistleblower

Act, as applied in this case. He says that pre-emption under the ADA exists only where the state law in question purports to regulate airline prices, routes or services. In this case, he argues, the relationship between Florida's prohibition against retaliatory discharges and these facets of air carrier operations is too attenuated to give rise to ADA pre-emption. Airtran responds that the scope of the ADA's express pre-emption provision is extremely broad, and that the connection between the type of conduct prohibited by the Whistleblower Act and air carrier "services" is sufficient to implicate the ADA's pre-emption clause. Moreover, appellee contends, Congress's enactment in 1999 of the WPP, 49 U.S.C. § 42121, supports a finding of pre-emption here, as the WPP provides an exclusive remedy for plaintiffs in Branche's position.

II

We review a summary judgment ruling *de novo,* applying the same legal standard used by the district court. *See Johnson v. Bd. of Regents,* 263 F.3d 1234, 1242-43 (11th Cir.2001). In conducting this examination, we view the materials presented and all factual inferences in the light most favorable to the non- moving party. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The burden of demonstrating the satisfaction of this standard lies with the movant, who must present "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" that establish the absence of any genuine, material factual dispute. *Id.*

Appendix A

As the Supreme Court observed in *Morales v. Trans World Airlines, Inc.*, "'[p]re-emption may be either express or implied, and is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" 504 U.S. 374, 383, 112 S.Ct. 2031, 2036, 119 L.Ed.2d 157 (1992) (quoting *FMC Corp. v. Holliday,* 498 U.S. 52, 56-57, 111 S.Ct. 403, 407, 112 L.Ed.2d 356 (1990)). In cases where Congress has chosen to explicitly address the issue of pre-emption, however, it generally is inappropriate to look beyond that provision to imply pre-emption from the statute's substantive dictates. As the Supreme Court has stated:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius:* Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517, 112 S.Ct. 2608, 2618, 120 L.Ed.2d 407 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505, 98 S.Ct. 1185, 1190, 55 L.Ed.2d 443 (1978) and *California Fed. Sav. & Loan Ass'n. v. Guerra,* 479 U.S. 272, 282, 107 S.Ct. 683, 690,

93 L.Ed.2d 613 (1987) (opinion of Marshall, J.)). Although the Supreme Court subsequently clarified that *Cipollone* does not establish an iron-clad rule against finding implied pre-emption under a statute containing an express pre-emption clause, *see Freightliner Corp. v. Myrick,* 514 U.S. 280, 287-89, 115 S.Ct. 1483, 1487-88, 131 L.Ed.2d 385 (1995), it recognized that "*Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption." *Id.* at 289, 115 S.Ct. at 1488. In other words, where a legislative enactment contains an express pre-emption provision, we typically do not consider the issue of implied pre-emption; our primary task is only to determine whether the state law in question falls within the scope of the statute expressly promulgated by Congress. *See Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541, 121 S.Ct. 2404, 2414, 150 L.Ed.2d 532 (2001) ("[O]ur task is to identify the domain expressly pre-empted. . . .").

Under the ADA, "a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law *related to a price, route, or service of an air carrier* that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1) (emphasis added). This pre-emption clause serves the ADA's broader goal of "promot[ing] maximum reliance on competitive market forces" as opposed to state regulation in shaping the contours of the airline industry. *American Airlines, Inc. v. Wolens,* 513 U.S. 219, 230, 115 S.Ct. 817, 824, 130 L.Ed.2d 715 (1995) (citation and internal punctuation omitted). Accordingly, the key question in this case is whether Branche's claim for retaliatory discharge under Florida's Whistleblower Statute,

Fla. Stat. § 448.102(1),[3] is "related to" the "service of an air carrier."[4] To answer this basic question we must define the terms "related to" and "service," as used in § 41713.

In undertaking this inquiry, we are mindful that the question of whether a federal statute expressly pre-empts a state law is one that turns on "statutory intent, and we accordingly 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Morales,* 504 U.S. at 383, 112 S.Ct. at 2036 (quoting *Holliday,* 498 U.S. at 57, 111 S.Ct. at 407); *see also Parise v. Delta Airlines, Inc.,* 141 F.3d 1463, 1465 (11th Cir.1998) ("Whether a federal statute pre-empts state law is a question of congressional intent.") (citing *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 252, 114 S.Ct. 2239, 2243, 129 L.Ed.2d 203 (1994)).

In *Morales,* the Supreme Court defined the phrase "related to," as used in the ADA's pre-emption provision.[5] It said:

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3. In pertinent part, this section of Florida law prohibits private employers from "tak[ing] any retaliatory personnel action against an employee because the employee has . . . [d]isclosed . . . to any appropriate governmental agency, under oath, in writing, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation." Fla. Stat. § 448.102(1).

4. No party argues that appellant's claim is "related to" the "price" or "route" of an air carrier.

5. At the time of the *Morales* decision, this provision was codified at 49 U.S.C. § 1305(a)(1), but its language was functionally

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> For purposes of the present case, the key phrase, obviously, is "relating to." The ordinary meaning of these words is a broad one—"to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,"—and the words thus express a broad pre-emptive purpose.

504 U.S. at 383, 112 S.Ct. at 2037 (quoting Black's Law Dictionary 1158 (5th ed.1979)). The Court then analogized the scope of § 41713 to that of ERISA's similarly worded pre-emption provision, which says that state laws are pre-empted "insofar as they . . . *relate to* any employee benefit plan. . . ." 29 U.S.C. 1144(a) (emphasis added). It noted that it previously had construed ERISA's language to mean that a state law is pre-empted—that is, "relates to" an employee benefit plan—" 'if it has a connection with or reference to such a plan.'" *Morales,* 504 U.S. at 384, 112 S.Ct. at 2037 (quoting *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983)). The Court then held:

> Since the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here: State enforcement actions having a connection with or reference to airline "rates, routes, or services" are pre-empted under 49 U.S.C.[ ] § 1305(a)(1).

(Cont'd)

identical to that contained in its modern incarnation, § 41713. *See Morales,* 504 U.S. at 383, 112 S.Ct. at 2036-37 ("Section 1305(a)(1) expressly pre-empts the States from 'enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law *relating to* rates, routes, or *services* of any air carrier. . . .'") (emphasis added).

Id. Thus, so long as the state law action has a connection with airline prices, routes or services, pre-emption under § 41713 is mandated.

This is so regardless of whether the state statute specifically addresses the airline industry. *See Morales,* 504 U.S. at 386, 112 S.Ct. at 2038. Indeed, the Court explicitly rejected the notion that "the ADA imposes no constraints on laws of general applicability." *Id.* It said that:

> Besides creating an utterly irrational loophole (there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute), this notion similarly ignores the sweep of the "relating to" language. We have consistently rejected this precise argument in our ERISA cases: "[A] state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect."

Id. (quoting *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 139, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990)). Although *Morales* does not define with particularity the circumstances under which a state law "relates to" air carrier services, it clearly says that the requisite connection exists where "the law expressly references the air carrier's prices, routes or services, or has a 'forbidden significant effect' upon the same." *United Parcel Serv., Inc. v. Flores-Galarza,* 318 F.3d 323, 335 (1st Cir.2003) (quoting *Morales,* 504 U.S. at 388,

112 S.Ct. at 2039). In this case, Florida's Whistleblower Act does not explicitly address airline services; accordingly, the only possible basis for pre-emption is if it has a sufficient—i.e., significant—impact on those services.

Notably, however, the Court recognized that there are limits on the scope of the ADA's "related to" language. Specifically, it said that "'[s]ome state actions may affect [airline prices, routes or services] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Morales,* 504 U.S. at 390, 112 S.Ct. at 2041 (quoting *Shaw,* 463 U.S. at 100 n. 21, 103 S.Ct. at 2901 n. 21); *see also Public Health Trust of Dade County v. Lake Aircraft, Inc.,* 992 F.2d 291, 295 (11th Cir.1993) ("Because [plaintiff's] design defect claims lie outside the pre-emptive reach of section 1305, we conclude that those claims are not pre-empted.").

Subsequently, in *Wolens,* the Court had an opportunity to apply § 1305(a) as partially defined in *Morales.* At issue in *Wolens* was whether Illinois's Consumer Fraud Act, a law of general applicability, was pre-empted by the ADA. In holding that it was, the Court said that the Consumer Fraud Act

> serves as a means to guide and police the marketing practices of the airlines; the Act does not simply give effect to bargains offered by the airlines and accepted by airline customers. In light of the full text of the pre-emption clause, and of the ADA's purpose to leave largely to the airlines themselves, and not at all to the States, the selection and design of marketing mechanisms

> appropriate to the furnishing of air transportation services, we conclude that [section] 1305(a)(1) pre-empts plaintiffs' claims under the Consumer Fraud Act.

Wolens, 513 U.S. at 228, 115 S.Ct. at 823-24.

For our purposes, *Wolens* is significant primarily for its explanation of the purposes of the ADA and because it directly ties the pre-emption inquiry to those purposes. In particular, it makes clear that through the ADA Congress sought to leave the bargained-for aspects of the air carrier-air passenger relationship to the workings of the market, i.e., to prevent the states from "impos[ing] their own public policies or theories of competition or regulation on the operations of an air carrier." *Wolens,* 513 U.S. at 229 n.5, 115 S.Ct. at 824 n.5 (citation and internal punctuation omitted). By reaching only *airline prices, routes* and *services,* § 41713 may be seen as defining—albeit only generally—the universe of such bargained-for elements of air carrier operations. This focus on the bargained-for aspects of air carrier service is perfectly consistent with the ADA's purpose of promoting competition within the airline industry; air carriers compete in only a limited range of contexts, e.g., fares, routes, timing, etc., which constitute the bargained-for elements of its service. Accordingly, to pre-empt state law claims concerning other elements of airline operations that are not bargained for plainly would not further the goal of promoting competition in the airline industry.

Although *Wolens* is thus helpful to the resolution of this case, the Court did not expand on *Morales*'s definition of

"related to," nor did it define "service [of an air carrier]," as used in the ADA's pre-emption clause. Accordingly, these definitional tasks fall to us. In tackling these questions, we bear in mind the important general maxim that in cases where the harm alleged is of a type that traditionally has been within the remedial province of the states, as is that alleged by Branche, *see infra,* "express preemption clauses must be construed narrowly." *Irving v. Mazda Motor Corp.,* 136 F.3d 764, 767 (11th Cir.1998) (citing *Taylor v. Gen. Motors Corp.,* 875 F.2d 816, 823-24 (11th Cir.1989)).

Like the Supreme Court, we never have defined the term "service," as used in § 41713. However, several other courts of appeals have weighed in on the meaning of the phrase "service of an air carrier." In *Charas v. Trans World Airlines, Inc.,* an *en banc* panel of the Ninth Circuit held that "service" "refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided (as in, 'This airline provides service from Tucson to New York twice a day.')." 160 F.3d 1259, 1265-66 (9th Cir.1998) (en banc), *opinion amended on denial of reh'g by* 169 F.3d 594 (9th Cir.1999) (en banc).[6] By contrast, the court held that "service" does not encompass things such as "the dispensing of food and drinks, flight attendant assistance, or the like." *Id.* at 1266. The court held that this narrow reading of the term "service" was compelled because a broader construction "effectively would result in the pre-emption of virtually everything an airline does. It seems clear to us that that is not what Congress intended."

6. The amendment to *Charas* was factual in nature and did not involve any substantive legal facet of the *en banc* panel's original opinion. *See* 169 F.3d at 594-95.

Id. Heavily influencing this reading of the ADA's pre-emption clause was the Ninth Circuit's conviction that the pre-emption of state tort law as applied to airlines would not further Congress's purpose of "avoid[ing] state interference with federal deregulation," *id.* at 1265, but rather would contradict the maxim that "pre-emption provisions are narrowly and strictly construed." *Id.* at 1264.

The Third Circuit has agreed in general terms with the approach to ADA pre- emption set forth in *Charas. See Taj Mahal Travel, Inc. v. Delta Airlines, Inc.,* 164 F.3d 186, 195 (3d Cir.1998) (holding that "the plaintiff's defamation claims are not pre-empted and may, therefore, proceed. Application of state law in these circumstances does not frustrate Congressional intent, nor does it impose a state utility-like regulation on the airlines. We therefore conclude that the plaintiff's suit is simply 'too tenuous, remote, or peripheral' to be subject to pre-emption, even though Delta's statements refer to ticketing, arguably a 'service.'").

By contrast, the Fifth and Seventh Circuits have construed "service" more expansively. In *Hodges v. Delta Airlines, Inc.,* the Fifth Circuit, sitting *en banc,* held as follows:

> "Services" generally represent a bargained-for or anticipated provision of labor from one party to another. If the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service

> bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself. These matters are all appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline. It is these [contractual] features of air transportation that we believe Congress intended to de-regulate as "services" and broadly to protect from state regulation.

44 F.3d 334, 336 (5th Cir.1995) (en banc) (citation omitted); *see also Travel All Over the World, Inc. v. Kingdom of Saudi Arabia,* 73 F.3d 1423, 1433 (7th Cir.1996) (adopting the definition of "services" set forth in *Hodges*).

Of these competing definitions, we believe that the Fifth Circuit's is more compelling. However, it is important to note that this is a distinction that does not make a dispositive difference in this case. For reasons that are more fully delineated *infra,* Branche's claim under Florida's Whistleblower Act is not pre-empted under *either* definition of "services." Indeed, his claim cannot be said to relate in any meaningful way to the transportation of passengers from one location to another, and accordingly it does not affect "airline services" as defined by the Ninth and Third Circuits. Similarly, appellant's claim does not significantly affect *any* bargained-for element of air carrier operations, and accordingly it does not affect "airline services" even under the broader reading of this term taken by the Fifth and Seventh Circuits.

Nonetheless, because the ultimate question in this case is whether Branche's state Whistleblower Act claim significantly affects air carrier "services," we are required to adopt a definition of the term "services." The broader reading of this term is preferable for three primary reasons. First, we can perceive no textual justification for a more truncated reading of "service." As the Fifth Circuit recognized in *Hodges,* this word generally refers to *any* bargained-for exchange of an intangible benefit. Indeed, the relevant dictionary definition of "service" is extremely broad: "[A] useful labor that does not produce a tangible commodity." Webster's Third New International Dictionary 2075 (3d ed.1961); *see also Hodges,* 44 F.3d at 337 n.6 (stating that "[s]pecific references to the words 'service' or 'services' in the Code of Federal Regulations governing airlines are too numerous to incorporate here," and setting forth several substantively diverse examples). Importantly, there is nothing in the text of § 41713 indicating that Congress intended to deviate from this standard definition. *See Morales,* 504 U.S. at 383, 112 S.Ct. at 2036 (we "assum[e] that the ordinary meaning of that language [used by Congress in the ADA's pre-emption provision] accurately expresses the legislative purpose") (citation and quotation marks omitted).

Second, as the Supreme Court plainly explained in *Morales,* the ADA's pre-emption clause is properly afforded an extremely broad scope. *See* 504 U.S. at 383-84, 112 S.Ct. at 2037. The Ninth Circuit's reading of "services," we believe, tends to undermine this interpretive guideline set forth by the Supreme Court. Indeed, no matter how broadly we construe the term "related to," *see Morales,* 504 U.S. at 383, 112 S.Ct. at 2037, if the scope of that phrase's referent (the word "services") is

sufficiently constricted, the scope of pre-emption under § 41713 will nonetheless be minimal.

Finally, and perhaps most significantly, we do not share the concern that a broad reading of "services" would result in the pre-emption of "virtually everything an airline does." *Charas,* 160 F.3d at 1266. As recognized in both *Wolens* and *Hodges,* the purpose of the ADA's pre- emption provision is to increase "reliance on competitive market forces rather than pervasive federal regulation." *Hodges,* 44 F.3d at 335; *see also Wolens,* 513 U.S. at 228, 115 S.Ct. at 823. Plainly this purpose is not served by interpreting the term "services" to include those aspects of airline operations that are not bargained-for by carriers and their passengers. *See Hodges,* 44 F.3d at 336 ("'Services' generally represent a bargained-for . . . provision of labor from one party to another.") (citation omitted).

Indeed, as the Fifth Circuit recognized, "[a] facile analogy to *Morales* and the ERISA pre-emption cases could suggest that 'services' includes all aspects of the air carrier's 'utility' to its customers, hence, any state tort claim may 'relate to' services as a result of its indirect regulatory impact on the airline's practices." *Hodges,* 44 F.3d at 337-38. Thus, for example, state law personal injury claims are not pre-empted, as evidenced by the fact that the ADA requires airlines to carry liability insurance "sufficient to pay, not more than the amount of the insurance, for bodily injury to, or death of, an individual or for loss of, or damage to, property of others, resulting from the operation or maintenance of the aircraft. . . ." 49 U.S.C. § 41112(a). Unsurprisingly, airlines do not compete on the basis of likelihood of personal injury, i.e.,

onboard safety, and as such it does not undermine the pro-competitive purpose of the ADA, as set forth in *Wolens,* 513 U.S. at 230, 115 S.Ct. at 824, to permit states to regulate this aspect of air carrier operations.

Accordingly, we readily conclude that even if "services," as used in § 41713, is construed to encompass aspects of air carrier operations beyond the transportation of passengers—i.e., the trappings and incidents of that transportation like on-board food and beverage services, ticketing and the like—its definition is nonetheless still limited to the *bargained-for* aspects of airline operations over which carriers compete. By contrast, those elements of air carrier operations over which airlines do not compete are not "services" within the meaning of the ADA's pre-emption provision, and state laws related to these elements are not pre-empted. *See, e.g., Alasady v. Northwest Airlines Corp.,* __ F.Supp.2d __, __ (D.Minn. Mar. 3, 2003) ("[T]his Court concludes that 'services of an air carrier' is best construed as the Fifth Circuit has done in *Hodges*. The procedures used to move passengers from the terminal onto the plane in an orderly fashion are an integral part of the customer's experience of air travel and are considered in evaluating the quality of their flight. Boarding procedures are relevant to competition in the airline industry. The Court therefore concludes that the term 'service' in § 41713(b)(1) encompasses boarding procedures."); *Ducombs v. Trans World Airlines,* 937 F.Supp. 897, 900 (N.D.Cal.1996) ("The majority of circuits that have dealt with the issue . . . have . . . defined the scope of 'services' narrowly, limiting pre-emption to activity that is based on economic decisions and that relates to the contractual features

that are bargained for by passengers."). This limitation largely mitigates the concern with overexpanding the reach of the ADA's pre-emption provision.

In short, the phrase "related to the . . . services of an air carrier" means having a connection with or reference to the elements of air travel that are bargained for by passengers with air carriers. This includes not only the physical transportation of passengers, but also the incidents of that transportation over which air carriers compete. This connection can be established by showing that the state law in question either directly regulates such services or, as is relevant in this case, has a significant economic impact on them. *See Morales,* 504 U.S. at 388, 112 S.Ct. at 2039; *Parise,* 141 F.3d at 1465-66 ("For a law to be expressly preempted by the ADA, a state must 'enact or enforce a law that relates to airline rates, routes, or services, either by expressly referring to them or by having a significant economic effect upon them.'" (quoting *Travel All Over the World,* 73 F.3d at 1431)).

Just as state law personal injury actions generally have been held not to be pre-empted under the ADA, employment discrimination actions typically have been held to fall outside the scope of the ADA's pre-emption clause. *See Newman v. Am. Airlines, Inc.,* 176 F.3d 1128, 1131 (9th Cir.1999) (holding California law barring physical disability discrimination is not pre-empted by the ADA); *Wellons v. Northwest Airlines, Inc.,* 165 F.3d 493, 495 (6th Cir.1999) (holding that the plaintiff's race discrimination claim was not pre-empted); *Parise,* 141 F.3d at 1467-68 (holding that the plaintiff's age discrimination claim was not pre-empted

by the ADA); *Aloha Islandair Inc. v. Tseu,* 128 F.3d 1301, 1303 (9th Cir.1997) (holding Hawaii law barring physical disability discrimination is not pre-empted by the ADA); *Abdu-Brisson v. Delta Airlines, Inc.,* 128 F.3d 77, 84 (2d Cir. 1997) (holding New York law barring age discrimination was not pre-empted by the ADA).

It is true that an airline's employment decisions may have an incidental effect on its "services," as defined above, but as the Second Circuit observed in *Abdu-Brisson,* "[p]ermitting full operation of . . . [anti-]discrimination law[s] will not affect competition between airlines—the primary concern underlying the ADA." 128 F.3d at 84. Indeed, employment standards fall squarely within the traditional police powers of the states, and as such should not be disturbed lightly. *See Hawaiian Airlines,* 512 U.S. at 252, 114 S.Ct. at 2243 ("Pre-emption of employment standards 'within the traditional police power of the State' 'should not be lightly inferred.'" (quoting *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 21, 107 S.Ct. 2211, 2222, 96 L.Ed.2d 1 (1987))); *see also Botz v. Omni Air Int'l,* 286 F.3d 488, 493 (8th Cir.2002). These holdings bear significantly on whether Branche's claim of retaliatory firing is pre-empted; at its root, this case involves a simple employment discrimination claim, with the prohibited basis for termination being not any inherent characteristic of the employee such as race, gender or disability, but rather his undertaking of protected activity.

Several courts have considered the specific question presented in this case, i.e., whether a claim for retaliatory discharge is pre-empted under § 41713, and although they have recognized that such employment actions ultimately may

affect in some way the transport of passengers or other incidents of "service," the majority of them have concluded that such claims are not pre-empted. *See Anderson v. Am. Airlines, Inc.*, 2 F.3d 590, 597-98 (5th Cir.1993) (holding that any connection between the claim for retaliatory discharge and airline "services" was too remote to give rise to ADA pre-emption); *Espinosa v. Cont'l Airlines,* 80 F.Supp.2d 297, 301 (D.N.J. 2000) (rejecting the argument that the plaintiff's state whistleblower claim was pre-empted based on the fact that it " 'related to' the quality of services rendered by an airline because it affect[ed] Continental's ability to discipline employees whose work is integral to 'air services' and to air safety"); *Ruggiero v. AMR, Corp.*, 1995 __ F.Supp.2d __ (N.D.Cal. Sept. 12, 1995). *But see Marlow v. AMR Servs. Corp.*, 870 F.Supp. 295, 299 (D.Haw.1994) (holding that the ADA did pre-empt a mechanic's claims that he was discharged in violation of state whistleblower act and state public policy, allegedly for reporting health and safety violations).

Put as simply as possible—and setting aside for the moment the impact of Congress's enactment of the WPP on our ultimate holding in this case—given the particularities of Branche's claim that he was discharged for his *post hoc* reporting of Airtran's safety violations, we believe that this case is more analogous to the majority of those cited above, and hold that appellant's state law claim is not pre-empted by the ADA. This is so essentially because safety is not a basis on which airlines compete for passengers, and as such is not something for which air travelers bargain; it is implicit in every ticket sold by every carrier. Accordingly, it does not serve the purposes of the ADA to pre-empt state law employment claims related to safety. *See Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 373 (3d Cir.1999)

("Safe operations . . . are a necessity for all airlines. Whether or not to conform to safety standards is not an option for airlines in choosing a mode of competition. For this reason, safety of an airline's operations would not appear to fall within the ambit of the ADA and its procompetition pre-emption clause."); *Smith v. Am. West Airlines, Inc.*, 44 F.3d 344, 347 (5th Cir.1995) ("[T]he Smiths' claim is that the safety of their flight was jeopardized by the airline's permitting a visibly deranged man to board. If appellants ultimately recover damages, the judgment could affect the airline's ticket selling, training or security practices, but it would not regulate the economic or contractual aspects of boarding. Any such effect would be 'too tenuous, remote or peripheral' to be pre-empted by § 1305(a)(1)") (citation omitted); *see also Lake Aircraft*, 992 F.2d at 294-295 (tort claim for defective aircraft design not pre-empted because not related to airline services). Although some safety-related claims may be tied to air carrier services, the very fact that they concern safety, standing alone, is insufficient to demonstrate this nexus.[7]

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7. It is true that in *Parise* we offered in dicta some indication that we thought claims implicating air carriers' safety concerns were "related to" their services so as to give rise to ADA pre-emption. *See* 141 F.3d at 1466 ("Although we are cognizant of Delta's compelling assertion that the threatening behavior in which Parise allegedly engaged 'relates to' the valid safety concerns of an airline, we conclude that the district court erred in finding Parise's state age discrimination action to be preempted by the ADA."). However, we noted that these safety issues were raised only as a defense to Parise's age discrimination claim (i.e., "the real reason we fired him was that he was unsafe"), and that this diminished the force of Delta's argument for pre-emption. In this vein, we said that "[b]y way of illustration, if Parise had claimed that Delta discriminated against

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him on the basis of a mental illness that sometimes caused him to exhibit violent tendencies and had relied on a state civil rights statute protecting emotionally disabled individuals from termination due to their disability, Delta's argument in favor of pre-emption analytically would carry greater weight." *Id.* at 1466 n. 3. Superficially, this hypothetical is similar to the claim actually advanced by Branche—that he was fired in retaliation for his reporting of unsafe maintenance practices.

However, even were we to consider *Parise*'s dicta to be binding, which plainly it is not, it would not require us to conclude that Branche's claim is pre-empted. There are two reasons for this. First, the connection between the claim of the plaintiff in the *Parise* hypothetical and airline services is much more direct than in the present case. Indeed, violent behavior aboard an airplane has great potential to disrupt the airline's primary transportation function, which is a "service" under even the restrictive definition set forth by the Ninth Circuit. Thus, a claim based on a termination for behaving violently is directly tied to this service. By contrast, as we explain more fully, *infra,* Branche's claim that he was fired for his *post hoc* reporting of a diagnostic maneuver that violated FAA regulations lacks this type of direct connection. Second and more fundamentally, airlines *certainly* do not compete on the basis of which one is the *least* safe. Branche's claim is simply that he reported safety violations and was fired. This alleged punishment for taking safety maintenance measures plainly does not pertain in any respect to a ground on which airlines attempt to draw passengers. Quite the contrary, as one court has recognized, "a state law prohibiting retaliatory discharge for whistleblowing only furthers the federal interest in the safety of the airline industry by encouraging employers to report unsafe conditions." *Espinosa,* 80 F.Supp.2d at 302.

Thus, because Branche's state Whistleblower Act claim is fundamentally an employment discrimination claim that does not implicate any arena in which airlines compete, we conclude based on the foregoing analysis that his claim does not relate to the services of an air carrier within the meaning of § 41713, and consequently is not pre-empted under that section.

Importantly, however, there is one more issue that we must consider before ultimately resolving this pre-emption question. In 1999, subsequent to the majority of the decisions discussed above, Congress enacted as part of the ADA the WPP, 49 U.S.C. § 42121, which provides that:

> No air carrier . . . may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . .
>
> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) . . . to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the [FAA] or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States. . . .

49 U.S.C. § 42121(a). This provision represents a federal analog to Florida's Whistleblower Act.[8] In evaluating whether the WPP

8. This is not to say, however, that the procedures for filing a complaint under the WPP exactly mirror those provided by Florida's Whistleblower Act. For example, under the WPP the plaintiff cannot (Cont'd)

has any effect on the foregoing analysis, the question we must ask is whether any aspect of that statute explains the proper scope of the ADA's pre-emption clause to a degree sufficient to alter our conclusion that pre-emption is inappropriate here because Branche's claim does not relate to the bargained-for aspects of air carrier operations.

Congress's enactment of the WPP figured prominently in the district court's finding of pre-emption in this case and in *Botz v. Omni Air Int'l,* 286 F.3d 488 (8th Cir.2002), the one circuit court decision handed down since the WPP's effective date to address ADA pre-emption in the context of a state whistleblower statute. *Botz* featured a claim brought by a flight attendant pursuant to Minnesota's whistleblower statute, under which employers are prohibited from subjecting employees to any adverse employment action in retaliation for the employee's refusal "to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or

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(Cont'd)
directly file a civil action against his employer, but instead must file a complaint with the Secretary of Labor. *See* 49 U.S.C. § 42121(b)(1). The Secretary then assesses the merits of the complaint and can either find it to be without merit and deny it or, if the Secretary finds the complaint to be meritorious, can order abatement of the violation, reinstatement with back pay and/or compensatory damages. *See* 49 U.S.C. § 42121(2) and (3). Any party aggrieved by the Secretary's order may obtain review of that order in the appropriate circuit court of appeals. Under Florida's Whistleblower Act, by contrast, plaintiffs are not required to negotiate these administrative obstacles to the adjudication of their claim in a judicial forum. *See* Fla. Stat. 448.103(1)(a) ("An employee who has been the object of a retaliatory personnel action in violation of this act may institute a civil action in a court of competent jurisdiction. . . .").

regulation. . . ." 286 F.3d at 492 n.6 (citing Minn.Stat. § 181.932, subd. 1(c)). Botz alleged that she had been fired in retaliation for refusing a flight assignment that she believed violated federal safety regulations. The airline argued in response that Botz's claim was pre- empted under § 41713. In analyzing this contention, the Eighth Circuit drew a straight line between a flight attendant's refusal to serve, federal regulations that prohibit the operation of a flight with fewer than a minimum number of flight attendants, and a resulting disruption of air service. In essence, the court was especially concerned that the state whistleblower statute functionally ensured the plaintiff's ability to ground a plane, and thereby disrupt the airline's service. It thus categorized Minnesota's statute as "a state law that granted a flight attendant or other air-carrier employee the right to refuse an assignment that is essential to a carrier's ability to provide its scheduled services." *Id.* at 496. Accordingly, it held, this law was related to air carrier services within the meaning of § 41713. *See id.* at 496-97.

Notably, the court also found support for this holding in Congress's enactment of the WPP. It reasoned that in passing the WPP Congress sought to impose a "more predictable response to public air-safety complaints . . . than would likely be possible if it had granted review in the courts of the fifty States." *Botz,* 286 F.3d at 497. It then rejected Botz's argument that "the WPP was not intended to pre-empt State whistleblower protections because, if it had been, Congress could easily have made such pre-emption express by including language in the WPP indicating that it was a whistleblowing air-carrier employee's exclusive remedy." *Id.* It said:

> We think this turns the proper logic on its head. When it fashioned the WPP, Congress was surely aware of the ADA's express pre-emption provision. It was presumably aware, as well, that the Supreme Court had determined that the provision had a broad application and should be given an expansive interpretation. Given this, we would expect Congress to have directed language in the WPP to the issue of federal pre-emption only if it had been Congress's intent that the WPP *not* exert any pre-emptive effect upon state whistleblower provisions.

Id. Finally, the Eighth Circuit dismissed Botz's reliance on *Espinosa,* as well as several other cases that had rejected pre-emption arguments under the ADA in the context of retaliatory discharge claims, because "[e]ach of these cases . . . relie[d] on the fact—a fact that is no longer true—that the ADA provided no claim or remedy for air-carrier employees discharged in retaliation for their whistleblowing conduct. Such employees now enjoy protection under the WPP." *Id.* at 497 n.9.

After carefully considering the reasoning employed in *Botz* and the enactment of the WPP, we remain convinced that Branche's whistleblower claim is not pre-empted. As for the connection between retaliatory discharge claims and airline services, we do not dispute the Eight Circuit's conclusion that the grounding of an airplane is related to airline services, in particular, the transport of passengers from one place to another. However, in this case, the connection—or, indeed, the potential connection—between Branche's actions and air carrier services is far more attenuated than in *Botz.* As the Eighth

Circuit said, if a flight attendant refuses to fly and a replacement cannot be found, FAA regulations prevent the plane from leaving the gate, thereby disrupting service. Here, by contrast, we are not concerned with the withdrawal of clearance for a plane to take off based on mechanical concerns, but instead only with Branche's *post hoc* reporting of a FAA violation. The likely consequence of reporting an unauthorized high powered run (as opposed to the reporting of a malfunctioning engine) is an investigation by FAA officials into the practices of Airtran's TIA mechanics, but not the grounding of the plane, which presumably has either been mechanically cleared and flown away or grounded for mechanical reasons independent of the subsequent report of the improper diagnostic procedure. Had Branche claimed that Airtran fired him in retaliation for refusing to allow a plane to take off due to safety concerns, this would present a situation closer to the one at issue in *Botz*. But that is not the claim before us.[9]

As for the enactment of the WPP, this statute says nothing whatsoever about pre-emption, an omission that is susceptible to more than one interpretation. We could say, as the *Botz* court did, that the absence of any discussion of pre-emption stemmed from a Congressional assumption that the ADA already pre-empted state whistleblower claims and that it was content with maintaining this status quo. Although this certainly is plausible, we believe that this interpretation ultimately is incorrect. Indeed,

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9. As our employment of this analytical modality indicates, it is the specifics of the retaliation claim, not the whistleblower statute, that appropriately determine pre-emption. Thus, retaliation claims brought under state whistleblower statutes must be evaluated on a case-by-case basis to determine the connection between the action in question and airline services. In Branche's case, this evaluation reveals that this connection is extremely loose at best.

the basis for the Eighth Circuit's holding is simply that (1) at the time of the WPP's enactment Congress knew of the ADA's express pre-emption provision; and (2) it also was aware that the Supreme Court had interpreted this provision broadly.

Although the first premise is undoubtable, it also is not especially helpful. Congress's knowledge of the provision implies nothing about the legislature's view of its scope. As for the second, the Supreme Court has interpreted only the phrase "related to." *See Morales,* 504 U.S. at 384, 112 S.Ct. at 2037. To date it has not weighed in on the meaning of "air carrier services." Moreover and more significantly, to the extent that Congress can be charged with cognizance of judicial views regarding the scope of § 41713, it must have known that the majority of courts to consider the issue found state law retaliatory discharge claims *not* to be pre-empted by the ADA. Against this background, it becomes significantly less clear that in saying nothing about pre-emption in the WPP Congress was somehow indicating that it assumed state whistleblower claims to be pre-empted. Indeed, an equally compelling argument could be made that Congress was indicating its acquiescence in the view that such state law claims are not pre-empted. Because the WPP says nothing about pre-emption and this silence is ambiguous, we find its enactment less probative of Congressional intent regarding the pre-emption of state whistleblower claims than did the Eighth Circuit.

As for the desire to enact a uniform means of resolving whistleblower claims, to infer from the very enactment of a federal remedy that Congress also intended to pre-empt all remotely equivalent state law causes of action—as distinguished

from divining Congress's intent regarding the scope of its express pre-emption provision (which, as stated, is ambiguous)—would be a species of implied pre-emption, which we presume is inapplicable where the statute in question features an express pre-emption clause.[10] *See generally Cipollone,* 505 U.S. at 517, 112 S.Ct. at 2618. Simply stated, it is possible to point to a multitude of substantive contexts in which parallel state and federal remedies exist, *see, e.g., Medtronic, Inc. v. Lohr,* 518 U.S. 470, 496-97, 116 S.Ct. 2240, 2256, 135 L.Ed.2d 700 (1996) (holding that a federal statutory remedy did not pre-empt "substantively identical" state law remedies for precisely the same conduct and harm), and the very enactment of a federal remedy, without more, cannot cause us to expand the scope of an express pre-emption provision to encompass and pre-empt *all* equivalent state remedies. *See generally id.*

In deciding pre-emption, whether before or after the enactment of the WPP, the question we must answer remains the same: Is the state law in question "related to" air carrier "services"? Though we do not wish to understate the importance of this legislation, the WPP changed neither the nature of Florida's Whistleblower Act nor the language of the ADA's pre-emption provision in any meaningful way. It simply added an additional remedy for plaintiffs seeking to advance a retaliatory discharge claim. Because the WPP says nothing about pre- emption, it leaves us in precisely the

10. Although as explained above a finding of implied pre-emption is not forbidden where such statutes are concerned, we perceive nothing in the WPP bearing in any significant way on Congress's intent to pre-empt state law claims against air carriers for retaliatory discharge that do not fall within the scope of the ADA's express pre-emption clause.

same position as we occupied before considering this statute; that is, it leaves us with our conclusion that the pre-emption of Branche's retaliatory discharge claim would not advance the pro-competitive goals of the ADA, as outlined by the Supreme Court in *Wolens*. Put differently, the WPP did not render these claims any more related to the bargained-for aspects of air carrier operations over which the airlines compete. As such, although the enactment of this statute renders the question of ADA pre-emption more difficult in this case, we do not believe that the WPP changed the legal landscape—or that it illuminated the intent of Congress to pre-empt state law whistleblower claims—to a degree sufficient to alter the conclusion that prior to its passage such claims were not pre-empted.

Because the district court erroneously concluded that Branche's state law whistleblower claim was pre-empted by the ADA, its summary judgment in favor of Airtran is vacated and this case is remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED AND FILED AUGUST 27, 2002

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:01-cv-1747-T-30MSS

MICHAEL F. BRANCHE,

Plaintiff,

v.

AIRTRAN AIRWAYS, INC.,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came on for consideration upon Defendant's Motion for Summary Judgment (Dkt. #23), supporting memorandum (Dkt. #24), and Plaintiff's memorandum in opposition thereto (Dkt. #26). Upon review and for the reasons set forth herein, the Court grants Defendant's motion.

Appendix B

BRIEF FACTUAL BACKGROUND[1]

Plaintiff Michael F. Branche filed a Complaint in the Circuit Court for the Sixth Judicial Circuit in and for Pinellas County, Florida in August, 2001. On September 10, 2001, the action was timely removed to this Court by Defendant on the grounds of diversity jurisdiction. The Court denied Plaintiff's motion to remand. (Dkt. 14).

The Complaint alleges a single count for violation of the Florida Whistleblowers Act, §448.101, *et. seq.*, *Fla. Stat.* This statute renders an employer liable to an employee for a retaliatory personnel action based upon an employee providing information to any appropriate governmental agency, person or entity conducting an investigation, hearing or inquiry into an alleged violation of the law, rule, or regulation. §448.102(2), *Fla. Stat.* Subsection 3 of the Florida Whistleblower Act renders an employer liable to an employee for retaliatory personnel action based upon an employee's objection to, or refusal to participate in any activity, policy or practice of the employer which is in violation of the law, rule or regulation.[2]

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1. Defendant quotes the facts in its motion from Plaintiffs Complaint, and Plaintiff's response specifically adopts those facts. As such, the facts are undisputed.

2. Plaintiff's seeks to recover under the following provisions of the Florida Whistleblower Act, §448.102 *Fla. Stat.*, which reads in pertinent part:

> An employer may not take any retaliatory personnel action against an employee because the employee has:
>
> (Cont'd)

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Plaintiff, employed by Defendant as an airline inspector, alleges that he objected to and refused to participate in Defendant's "illegal and dangerous policy and practice of breaching the independence of the inspector function and chain of command established by FAA regulations." Plaintiff claims that he observed violations of FAA regulations regarding engine inspections, namely "improper high powered engine runs." Plaintiff alleges that he was fired as a result of his objection, his refusal to participate in these practices, and Plaintiff's furnishing of information to the FAA and its investigation of Defendant.[3] Plaintiff also filed a union grievance about this incident. Plaintiff alleges that the FAA was investigating Defendant's "illegal and dangerous policy and practices which, among other things, violated FAA regulations, endangered lives of co-workers, the public and public property." (Complaint, ¶37).

(Cont'd)

> . . . (2) Provided information to, or testified before, any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer; (3) Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.

3. Plaintiff alleges that he was fired for "falsifying his time card and stealing approximately two hours of pay from Defendant for time not worked;" a claim that Plaintiff contends is "baseless" and a pretext for retaliatory discharge. (Complaint, ¶¶26-30).

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LEGAL ANALYSIS

Summary Judgment Standard

Motions for summary judgment should only be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The existence of some factual disputes between the litigants will not defeat an otherwise properly supported summary judgment motion; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original). Throughout this analysis, the judge must examine the evidence in the light most favorable to the non-movant and draw all justifiable inferences in her favor. *Id.* at 255.

This Court may not decide a genuine factual dispute at the summary judgment stage. *Fernandez v. Bankers Nat'l Life Ins. Co.*, 906 F.2d 559, 564 (11th Cir. 1990). "[I]f factual issues are present, the Court must deny the motion and proceed to trial." *Warrior Tombigbee Transp. Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir.1983). A dispute about a material fact is genuine and summary judgment is inappropriate if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248; *Hoffman v. Allied Corp.*, 912 F.2d 1379 (11th Cir. 1990).

Appendix B

Is the Florida Whistleblower Act Preempted by Federal Statute?

Defendant contends that Plaintiff's retaliatory discharge claim brought under Florida's Whistleblower Act is preempted by certain provisions of the Airline Deregulation Act (ADA). The ADA contains a specific provision for preemption which reads as follows:

> Except as provided in this subsection, a State, political subdivision of this State, or political authority of at least 2 States, may not enact or enforce a law, regulation, or other provision having the force and effect of law ***related to a price, route, or service of an air carrier*** that may provide air transportation under this subpart.

49 U.S.C. §41713(b)(1) (emphasis added). Defendant urges the Court to construe the "related to" language broadly. *Botz v. Omni Air International*, 286 F.3d 488, 492 (8th Cir. 2002), (*citing Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992)[4]).

Defendant points to a specific provision within the ADA that provides federal whistleblower protection, 49 U.S.C. §42121, which reads in pertinent part:

> Discrimination against airline employees. – No air carrier or contractor or subcontractor of an air carrier

4. The issue in *Morales* was whether a state law prohibiting deceptive advertising was preempted by the ADA. In finding preemption, the Court utilized a broad reading of the phrase "related to" in the ADA's preemption clause. *Id.*

> may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee –
>
> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to an air carrier's safety under this subtitle or any other law of the United States.

This statutory provision provides for a complaint process through the Department of Labor, and procedures for investigation and appellate review. *Id.* Remedies include "affirmative action to abate the violation," reinstatement, including back pay and other conditions of employment, and compensatory damages. 49 U.S.C. §42121(b)(3)(B). Defendant contends that this federal whistleblower provision provides Plaintiff's exclusive remedy for such conduct.

In addition, Defendant contends that Plaintiff's Complaint fits squarely within the Eighth Circuit's decision in *Botz v. Omni Air International*, 286 F.3d 488 (8th Cir. 2002). *Botz* involved a flight attendant plaintiff who was fired after refusing a flight assignment that she believed violated federal regulations on flying time. Reading the preemption clause language broadly, the *Botz* Court found that Minnesota's whistleblower statute was expressly

preempted by Congress in the ADA, a finding that was bolstered by the enactment of the federal whistleblower protection in 2000, and dismissed Botz's complaint. *Id.* at 492-97 (*citing Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992)).

Plaintiff disputes that his Florida Whistleblower Act claim is preempted by federal law, in part because Plaintiff contends that his claim is not "related to a price, route, or service of an air carrier." Plaintiff further contends that the federal whistleblower provision itself fails to contain the required express preemption language, like the preemption language found in the ADA.

Plaintiff also attempts to factually distinguish *Botz* on the grounds that Botz had a statutory right under the Minnesota whistleblower law to refuse to provide flight service based on her belief that her employer was violating the law.[5] Here, Plaintiff contends that his reports to the FAA concerned actual safety violations regarding an aircraft engine and were protected under the Florida Whistleblowers Act. Plaintiff further argues that "state law protection for employees reporting violations of FAA regulations does not hamper competition because airlines do not compete based on levels of safety."

Plaintiff also points to other cases to support his position that federal and state law claims may coexist. In *Espinosa v. Continental Airlines*, 80 F. Supp. 2d 297 (D.N.J. 2000), the court found that a retaliatory discharge claim similar to

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5. The Minnesota statute specifically prohibited retaliation against employees who report a violation of any federal or state law *in good faith* or refuse an order to perform an action that the employee has an *"objective basis in fact"* to believe violates federal or state law. *Botz*, 286 F.3d at 492, n.6.

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Plaintiff's (an aircraft technician who was terminated after reporting mechanical problems) was not preempted by the ADA because it would be unreasonable to find that a "retaliatory discharge was related to the services provided by an air carrier." The second case, a Florida appellate decision, also involved an aircraft repair station employee and specifically held that Florida's Whistleblower Act is not preempted by the ADA because Florida's Act "does not impinge on air carrier's rates, routes or services." *See Vanacore v. Unc Ardco, Inc.*, 697 So. 2d 892, 893 (Fla. 4th DCA 1997).

As Plaintiff correctly points out, as does the *Botz* Court, neither of these cases was decided after the enactment of the federal whistleblower protection provision set forth in 49 U.S.C. §42121. Accordingly, the Court is not persuaded by these cases and instead, finds the Eight Circuit's decision in *Botz* compelling. *See also Parise v. Delta Airlines*, 141 F.3d 1463, 1466 n.4 (11th Cir. 1998) (addressing same federal preemption provision in ADA as it relates to age discrimination claim — the "basis of the cause of action [] conceivably would conflict with the underlying purposes of the ADA and therefore give rise to a finding of preemption").

In *Botz*, the Eighth Circuit found the state whistleblower statue had a "forbidden connection" with both air carrier routes and services under the "broadly applied" language of the ADA's preemption provision. The Court reasoned that because the number of airline stewards is prescribed by federal regulation, a steward's refusal to serve on an assigned flight could jeopardize service, a finding that was bolstered by the enactment of the federal whistleblower protection provision in 2000. *See Botz*, 286 F.3d at 495.

As to the federal whistleblower provision, the Eighth Circuit specifically noted that it was a "single, uniform standard for dealing with employee complaints of air-safety violations," and in doing so, Congress "furthered its goal of ensuring that the price, availability, and efficiency of air transportation rely primarily upon market forces and competition rather than allowing them to be determined by fragmented and inconsistent state regulation." *Id.* at 497. Commenting upon the complaint and review process therein, the Court reasoned that review by federal courts of appeal was a "more predictable" response to air-safety complaints than possible if permitted in the courts of the fifty states. *Id.*

This Court analogizes Plaintiff's claim to that in *Botz*. Plaintiff alleges that the "improper high powered engine run" reported by Plaintiff resulted in the jet being taken out of service. (Complaint, ¶20). Plaintiff also alleges that Defendant's violation of FAA regulations and the FAA's investigation of Defendant's alleged "illegal and dangerous" practices "endangered the lives of co-workers, the public and public property." (Complaint, ¶37). These allegations bring Plaintiff's claims within the prohibited connection of an air carrier's "price, route, or service" and they are therefore preempted by federal law. Moreover, the Court is persuaded that preemption is appropriate because the protections afforded by the federal whistleblower provision in the ADA give a federal agency (with review by federal courts of appeal) specific authority to address the same conduct as the state statute.[6]

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6. The Court is not persuaded that the "savings clauses" in either the ADA or the state statute preclude its conclusion that federal law preempts Plaintiff's claim. *See* 49 U.S.C. §40120(c); §448.105 *Fla. Stat.*

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendant's Motion for Summary Judgment (Dkt. #23) is **GRANTED** for the reasons set forth herein. The Clerk is directed to close the case and enter judgment in favor of Defendant.

DONE and **ORDERED** in Tampa, Florida on this 27 day of August, 2002.

s/ James S. Moody, Jr.
James S. Moody, Jr.
UNITED STATES DISTRICT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:01-cv-1747-T-30MSS

MICHAEL F. BRANCHE,

Plaintiff,

v.

AIRTRAN AIRWAYS, INC.,

Defendant.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court. The issues have heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the defendant.

Date: August 27, 2002

SHERYL L. LOESCH, CLERK

By: s/ Joanne Hueting
J. Hueting, Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC FILED OCTOBER 2, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-14920-DD

MICHAEL F. BRANCHE,

Plaintiff-Appellant,

versus

AIRTRAN AIRWAYS, INC., a foreign corporation,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION (S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: MARCUS and WILSON, Circuit Judges, and RESTANI*, Judge.

PER CURIAM:

The Petition (s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service

* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX D — RELEVANT STATUTES

49 USCA § 42121

§ 42121. Protection of employees providing air safety information

(a) Discrimination against airline employees.—No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

(b) Department of Labor complaint procedure.—

(1) Filing and notification.—A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

(2) Investigation; preliminary order.—

(A) In general.—Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a

preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(B) Requirements.—

(i) Required showing by complainant.—The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Showing by employer.—Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) Criteria for determination by Secretary.—The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) Prohibition.—Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(3) Final order.—

(A) Deadline for issuance; settlement agreements.—Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) Remedy.—If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to—

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

(iii) provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.

(C) Frivolous complaints.—If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding $1,000.

(4) Review.—

(A) Appeal to Court of Appeals.—Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such

violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

(B) Limitation on collateral attack.—An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

(5) Enforcement of order by Secretary of Labor.

Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

(6) Enforcement of order by parties.—

(A) Commencement of action.—A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(B) Attorney fees.—The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(c) Mandamus.—Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code.

(d) Nonapplicability to deliberate violations.—Subsection (a) shall not apply with respect to an employee of an air carrier, contractor, or subcontractor who, acting without direction from such air carrier, contractor, or subcontractor (or such person's agent), deliberately causes a violation of any requirement relating to air carrier safety under this subtitle or any other law of the United States.

(e) Contractor defined.—In this section, the term "contractor" means a company that performs safety-sensitive functions by contract for an air carrier.

Appendix D

49 USCA § 41713

§ 41713. Preemption of authority over prices, routes, and service

(a) Definition.—In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) Preemption.—(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.—

Appendix D

(A) General rule.—Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered.—Subparagraph (A)—

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

(C) Applicability of paragraph (1).—This paragraph shall not limit the applicability of paragraph (1).

Appendix D

FLA. STAT 448.102

448.102. Prohibitions

An employer may not take any retaliatory personnel action against an employee because the employee has:

(1) Disclosed, or threatened to disclose, to any appropriate governmental agency, under oath, in writing, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation. However, this subsection does not apply unless the employee has, in writing, brought the activity, policy, or practice to the attention of a supervisor or the employer and has afforded the employer a reasonable opportunity to correct the activity, policy, or practice.

(2) Provided information to, or testified before, any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer.

(3) Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.